

RECEIVED
ORIGINAL

FEB 1 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Cal-Nev-Ari, Boulder City,)
and Las Vegas, NV))

MM Docket No. 93-279
RM-8368
RM-8385

To: Chief, Allocations Branch
Audio Services Division
Mass Media Bureau

Attention: Mail Stop 1800D5

SUPPLEMENTAL REPLY COMMENTS

1. Richard W. Myers ("Myers") hereby petitions for leave to respond to the "Reply Comments" filed in this proceeding by Rock "N" Roll, Inc. ("KRRI") on January 26, 1994.^{1/} Myers is the petitioner in RM-8368, who has proposed the allotment of Channel 285A to Cal-Nev-Ari, Nevada. These Supplemental Reply Comments are directed solely toward the Reply Comments filed on January 26, 1994, by Rock "N" Roll, Inc. ("KRRI").

2. KRRI first argues that the letter from U.S. Senator Harry Reid of Nevada, addressing the community status of Cal-Nev-Ari, could not be located in the Commission's docket file. Myers has no control over how the Commission handles incoming correspondence. Senator Reid's letter was clearly marked with the pertinent docket number and, as far as Myers knows, was submitted to the Commission as a timely, public initial comment in this

^{1/} A separate Motion for Leave To File these Supplemental Reply Comments is being submitted simultaneously herewith.

proceeding. A copy is attached hereto for convenient reference and is being served on KRRI.^{2/}

3. KRRI argues at length that Cal-Nev-Ari is not a "community" sufficient for the allotment of an FM channel. It submits photographs and attempts to tear down Myers' arguments about why Cal-Nev-Ari is a community in and of itself. Myers submitted evidence which included a study by two professional sociologists, who personally visited and studied the community. Senator Reid, who represents the area, also spoke to its community status.^{3/} KRRI does what any good advocate tries to do -- take the material submitted by someone else and re-paint the picture to draw the opposite conclusion. But KRRI submits nothing at all from anyone with personal knowledge of the facts.^{4/}

4. An able attorney can always take a set of facts and structure them to lead a decision-maker in a direction favorable to his or her client. But ultimately the crux of this case revolves around two basic aspects: (1) Myers has submitted extensive detailed evidence from professional experts with personal knowledge of the facts. These experts have concluded

^{2/} KRRI does not state whether it attempted to obtain a copy of the letter from Senator Reid's office after seeing the reference to the letter in Myers' Reply Comments.

^{3/} In a letter submitted to the Mass Media Bureau's FM Branch and Allocations Branch on January 27, 1994, KRRI included its own letter from Senator Reid. However, that letter only expressed sympathy for KRRI's alleged interference problem and in no way undermined Senator Reid's previous clear statements as to the viability of Cal-Nev-Ari as a community.

^{4/} Not even KRRI's photographs are accompanied by a declaration of the person who took them or any other details about them.

that Cal-Nev-Ari is a viable community. KRRI has submitted no comparable evidence, and no evidence of any kind supported by a declaration of a person with first-hand knowledge, to support its opposite conclusion. (2) KRRI argues that it would be proper for the Commission to find that the residents of Cal-Nev-Ari live in no "community" at all but are only clustered in the desert in the middle of nowhere. Myers vigorously disputes that such a conclusion is warranted under the facts of this case, given the isolated nature of the community, the sociological characteristics of rural Nevada, the lack of support from or dependence on any other nearby community, and the facts about this particular community which Myers has submitted.^{5/}

5. KRRI draws a parallel between Cal-Nev-Ari and Cleveland and Ebenezer, MS, MM Docket No. 93-100, DA 93-1373, released December 13, 1994, a case which it argues Myers did not distinguish.^{6/} Myers cited Cleveland for the proposition that the Commission is not entirely consistent in its decision-making, a point which KRRI does not refute. Moreover, KRRI's counsel is also participating in the Cleveland proceeding and filed a petition for reconsideration on January 10, 1994, asserting that Ebenezer "meets the Commission's criteria for a community";^{7/} so he appears to agree with Myers with respect to the

^{5/} To the extent that KRRI's argument is simply that the burden falls on Myers, Myers has certainly met that burden.

^{6/} KRRI Reply Comments at page 4.

^{7/} Afro-American Broadcasters of Mississippi Petition for Reconsideration in MM Docket No. 93-100 at page 4.

appropriateness of making an allotment to a community with a small population.^{8/}

6. As to KRRI's challenge to the economic viability of a station in Cal-Nev-Ari,^{9/} Myers has previously addressed that point adequately, noting the substantial amount of highway traffic passing near Cal-Nev-Ari on the way to and from Las Vegas, and citing Yermo and Mountain Pass, CA, 45 RR 2d 58 (1979), in support of reliance on highway traffic for economic support.

7. In discussing the application of Section 307(b) of the Communications Act, KRRI cites Ruarch Associates, 99 FCC 2d 338 (Rev. B.d 1984), aff'd, 101 FCC 2d 1358 (1985), for the proposition that a 307(b) first local service preference will not be given to a community of under 1,000 persons. Ruarch does not stand for that proposition on a blanket basis. In that case, the choice was between two proposals for a first local transmission service, in communities located close together, so that essentially the same area and population would be covered no matter which proposal was chosen. The instant case is entirely different, because it compares a proposal for a first local transmission service with a proposal to exchange two channels of the same class, which would establish no new service, no first

^{8/} That same petition for reconsideration relies on the Yermo case cited by Myers and discussed at paragraph 6, infra.

^{9/} KRRI Reply Comments at p. 6.

local transmission service, and not even any upgraded service.
Thus Ruarch should not govern the disposition of this case.^{10/}

8. For the foregoing reasons, Myers submits that the record fully justifies the allotment of Channel 285A to Cal-Nev-Ari; and if the alleged interference problem between KRRI and KRBO merits remedial action by the Commission, such action should be something that does not preclude making the proposed allotment to Cal-Nev-Ari.

Arent Fox Kintner
Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, DC 20036-5339
(202) 857-6024

Respectfully submitted,


Peter Tannenwald

February 1, 1994

Counsel for Richard W. Myers

^{10/} Finally, KRRI discusses its alleged signal interference problem at length -- a discussion which it was entitled to repeat on January 26. Myers has already addressed this point in previous pleadings, showing that the spacing between KRBO and KRRI meets the Commission's separation requirements and that KRRI is entitled to no further protection. Myers also notes that the undated letter from Sands Broadcast Engineering, submitted with KRRI's Reply Comments, discusses no specific incident of interference; and the recitations of a few complaints in KRRI's January 27, 1994, letter to the Mass Media Bureau is not supported by any declaration of a person with personal knowledge of the facts. Finally, KRBO, the other station involved, has strongly opposed KRRI's proposed channel changes; so KRRI's proposal is unilateral, not consensual as to the two stations involved.

12-28-93 02:31PM FROM SENATOR HARRY REID

CROCKETT & MYERS

TO 317023848102

P002/003

002

HARRY REID
NEVADA

United States Senate

WASHINGTON, DC 20510-2803

December 28, 1993

William F. Caton
Acting Administrator
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: MM Docket No. 93-279
FM Table of Allotments, Cal-Nev-Ari, Nevada

Mail Stop 1170

Dear Mr. Caton:

I have reviewed the Commission's Notice of Proposed Rule Making in the above referenced proceeding, DA-1265, released November 12, 1993, where a question has been raised as to whether Cal-Nev-Ari is a "community" for licensing purposes under the Communications Act.

In ruling on this matter, the Commission should take into account the difference between Nevada, one of the nation's least densely populated states, and other more densely populated states where the Commission may have found in the past that very small groupings of people do not constitute a legally cognizable "community." In Nevada, there are many remote places where only a few hundred people may live, but even though there may not be a large enough nucleus to support multiple community institutions and organizations, the people have the same ties binding them together as in any other town or city -- perhaps even closer ties since people in a small community are often highly dependent on one another in emergency situations.

In a community such as Cal-Nev-Ari, the local restaurant or casino serves as a gathering place and not only provides economic support but also fulfills the function that social and civic clubs would fulfill in a larger community. The fact that social and economic functions are combined in one place does not make them any less meaningful.

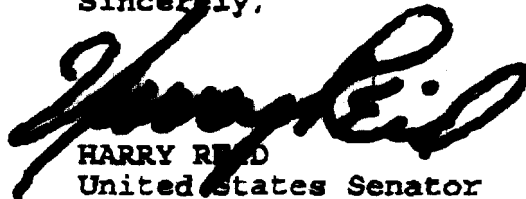
I doubt that it was ever the intent of Congress in the Communications Act to penalize the residents of a place like Cal-Nev-Ari by depriving them of a local radio station just because they are few in number and located in a rural area. Cal-Nev-Ari is an entity in itself and is not attached to or part of any

Page 2

larger community. Clark County extends from the major city of Las Vegas all the way to the Arizona border and cannot be said to be a single "community." To say that Cal-Nev-Ari is not a "community" would be to ignore the validity of rural communities in the western states.

I welcome the desire of a responsible citizen to build a radio station to serve Cal-Nev-Ari, and I urge the Commission to look favorably on the proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Harry Reid", is written over the typed name and title.

HARRY REID
United States Senator

HMR:jmf

CERTIFICATE OF SERVICE

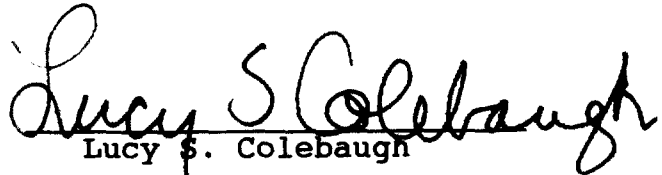
I, Lucy S. Colebaugh, do hereby certify that on this first day of February, 1994, I have caused to be sent by first-class United States mail, postage prepaid, copies of the foregoing "Supplemental Reply Comments" to the following:

Senator Harry Reid
United States Senate
Washington, DC 20510-2803

Jerrold Miller, Esquire
Miller and Miller, P.C.
P.O. Box 33003
Washington, DC 20033-0003
Counsel for Rock
"N" Roll, Inc.

Eric S. Kravetz, Esquire
Brown, Nietert & Kaufman
1920 N St., N.W., Suite 660
Washington, DC 20036
Counsel for Patmor
Broadcasting Corp.

Ms. Leslie K. Shapiro*
Allocations Branch
Room 8313, 2025 M St., N.W.
Federal Communications Commn.
Washington, DC 20554


Lucy S. Colebaugh

*by hand delivery